

FEDERAL CIRCUIT COURT OF AUSTRALIA

BAX17 v MINISTER FOR IMMIGRATION

[2019] FCCA 3289

Catchwords:

MIGRATION – Non reviewable decision of a delegate of the Minister for Immigration – application for a Safe Haven Enterprise visa – where applicant found to have provided bogus document without reasonable explanation – whether Delegate made a jurisdictional error through apprehended bias or legal unreasonableness – no jurisdictional error made out – further amended application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5, 57, 91WA

Applicant:	BAX17
Respondent:	MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS
File Number:	PEG 137 of 2017
Judgment of:	Judge Street
Hearing date:	14 November 2019
Date of Last Submission:	14 November 2019
Delivered at:	Perth
Delivered on:	14 November 2019

REPRESENTATION

Counsel for the Applicant: Mr M Crowley

Solicitors for the Applicant: AUM Legal

Solicitors for the Respondent: Mr P Macliver, Australian Government Solicitor

ORDERS

- (1) Leave is granted to the applicant to rely upon the further amended application filed on 20 September 2019.
- (2) The further amended application is dismissed.
- (3) The applicant pay the respondent's costs fixed in the amount of \$7,467.00.
- (4) **DATE OF ORDER: 14 November 2019**
- (5)
- (6)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT PERTH

PEG 137 of 2017

BAX17

Applicant

And

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**

Respondent

REASONS FOR JUDGMENT

1. This is an application for a Constitutional writ in respect of a non-reviewable decision of a delegate of the respondent (“the Delegate”) made on 1 February 2017 finding that the applicant had provided a bogus document as defined in s 5(1) of the *Migration Act 1958* (Cth) (“the *Act*”) and did not provide a reasonable explanation of doing so within s 91WA of the *Act*.
2. The applicant is a citizen of Afghanistan who arrived in Australia as an unauthorised maritime arrival on 20 May 2013.
3. The applicant was interviewed by the Department of Immigration (“the Department”) on 26 June 2013, and by letter dated 11 May 2016, the applicant was allowed to make a valid application for a Temporary Protection (subclass 785) visa, or a Safe Haven Enterprise (subclass 790) visa.

4. On 11 July 2016, the applicant lodged with the Department a Safe Haven Enterprise visa together with documents in support. On 13 October 2016, the applicant attended an interview with the Minister in relation to the Safe Haven Enterprise visa and provided further documents.
5. On 16 November 2016, the Delegate wrote to the applicant via letter titled, "Invitation to comment on information for a protection visa." The letter was clearly a natural justice letter in respect of information the Department had received in respect of the applicant's Afghan taskera and driver's licence. The letter referred to those documents having been assessed to be a bogus document and identified the definition of a bogus document.
6. The letter expressly referred to the taskera being a different document to that provided to the Department in 2013, but containing the same photograph, and that there is no reasonable explanation as to why this document varies, or why the year of birth has been written in English characters on the most recent version of the taskera that has been supplied.
7. The letter also referred to the driver's licence having a different photograph than that provided in 2013 and having been altered in a manner in which it appears as if the person altering the document attempted to conceal the alteration.
8. The letter expressly said:

If it is assessed that you have produced a bogus document as evidence of your identity, nationality or citizenship, then your visa application may be refused under visa section 91WA(1) of the Act.
9. The applicant was invited to reply and comment on that information and was also given an opportunity to provide a reasonable explanation for producing the bogus document. The letter expressly identified that if the Minister was not satisfied that the applicant had a reasonable explanation, and did not produce documentary evidence and take reasonable steps to produce such evidence, then the visa application must be refused under s 91WA(1) of the *Act*, and a timeframe for response was provided.

10. The applicant did provide a response on 29 November 2016, and, on 3 December 2016, the applicant's migration agent provided a copy of the second taskera and accompanying translation.
11. On 22 December 2016, the Delegate sent a further letter to the applicant, again, as a natural justice letter, inviting the applicant to comment on information. It referred to the correspondence sent on 16 November in relation to it having been assessed that the taskera that had been provided in support of the Safe Haven Enterprise visa was a bogus document in referring to the definition.
12. The letter identified that, following the applicant's response on 29 November 2016, the Delegate had formed a reasonable suspicion that:

the aforementioned taskera is a bogus document. As such you may be an excluded fast track review applicant as defined by s5(1)(a)(vi) of the Migration Act 1958 because you have provided a bogus document in support of your application without providing a reasonable explanation. This means that if you are refused the grant of a protection visa; your protection application cannot be reviewed by the Immigration Assessment Authority (IAA).
13. The letter referred to the fact that it had come to the Delegate's attention that a further taskera was supplied in 2013 which was different to that in the previous s 57 letter, and that the document contains the Latin numerals i, iii, v, vii and a different photograph than the other taskeras supplied.
14. The Delegate referred to the explanation advanced in the last submissions and found that it did not take into account the further document, and that, unless a reasonable explanation of the provision of the documents was received, the document further confirms the Delegate's earlier concerns that the applicant had supplied a bogus document in relation to his Safe Haven Enterprise visa application.
15. The applicant was invited to comment and, further, to provide a reasonable explanation for producing a bogus document, if the applicant had one. The letter identified a timeframe for response.
16. On 1 February 2017, the Delegate made a decision refusing to grant the applicant a Safe Haven Enterprise visa and concluded that the applicant

met the definition of an excluded fast-track applicant under s 5(1) of the *Act*.

17. The Delegate addressed the Safe Haven Enterprise visa in Parts 1 to 6 of the Delegate's reason and critically, in Part 7, addressed whether the applicant was an excluded fast-track review applicant.
18. The Delegate referred to the provisions of s 5(1) of the *Act* and identified reasons for the finding, referring back to Part 3, that the applicant has supplied three taskeras and two driver's licences. The Delegate then set out a description of the original taskera, a copy taskera, a further taskera, an original driver's licence and a copy driver's licence.
19. The Delegate found that the original taskera, with a number 714877, supplied by the applicant at his Safe Haven Enterprise visa interview, appears to have been altered with handwriting in a different coloured ink with the numerals 1357 written over the previous non-English text. The Delegate found that this alteration, and the fact the applicant has supplied more than one version of a taskera to the Department, gives rise to the assessment that the original taskera supplied to the Department had been intentionally altered.
20. The Delegate referred to the two driver's licences and noted that the photograph on the original supplied by the applicant in the Safe Haven Enterprise visa interview appears to have been recently added, with the document being stamped and the signature being completed so that it appears to have been added after the photograph, despite it being visible in the other document underneath the photograph. The Delegate assessed that this document had been intentionally altered.
21. The Delegate referred to the applicant being sent a s 57 invitation to comment letter on 16 November 2016 and referred to the response that was provided.
22. The Delegate referred to the explanations and referred to the sending of a further letter under s 57 on 22 December 2016 and referred to the applicant's response to that letter.

23. The Delegate was not satisfied that the applicant had provided a reasonable explanation for providing a bogus document in the form of the original Afghan taskera and driver's licence at the interview.
24. The Delegate was not satisfied with the applicant's response that the Latin numerals written on the Afghan taskera are generally used if the official has this knowledge. The Delegate found the handwriting was intentionally written over the previous writing and does not appear to have been written at the same time as the previous information was completed on the document. The Delegate was not satisfied that the taskera sent digitally to the Department in 2013, that contains the same photograph used in the original, is a document that the applicant's family applied for while he was in Afghanistan.
25. The Authority was not satisfied as to the applicant's explanation for submitting multiple differing taskeras to the Department, nor as to why the two original documents he supplied in his Safe Haven Enterprise visa had been altered.
26. The Delegate identified that it reasonably suspected that the documents provided at the Safe Haven Enterprise visa are bogus documents as they are counterfeit or have been altered by a person who does not have authority to do so.
27. The Delegate referred to not being satisfied that there is evidence that the Afghan authorities keep a negative of their citizens on file so that they can reproduce a photograph of them. The Delegate referred to the substantive country information indicating that photographs must be submitted by the individual applying for a taskera, including applying for a replacement taskera. The Delegate found that this suggests that the applicant would have needed to present another photograph on obtaining the duplicate in 2013. The Authority placed significant weight on the Department of Foreign Affairs and Trade ("DFAT") assertion that recordkeeping in Afghanistan is not centralised, nor computerised. It was in these circumstances that the Delegate was not satisfied that the Afghan authorities would have the systems nor the recordkeeping functioning to keep negatives of citizens with a taskera on file.

28. The Delegate did not consider it reasonable that a government authority, even one as decentralised as Afghanistan, would change a photo on an identity document before restamping it and altering the signature so that the photograph is made to look like it had not been changed. The Delegate found that it would more reasonable to assume that the government authority would reissue the entire document if they were, in fact, going to change a document's photograph. The Delegate was not satisfied that the Afghan authorities have a negative photograph of the applicant and, as such, did not consider it reasonable that they had altered the documents.
29. The Delegate found that the applicant provided a bogus document in that the form of the two original documents supplied at the Safe Haven Enterprise visa interview were counterfeit, or had been altered by a person who does not have authority to do so.
30. In these circumstances, the Delegate was satisfied that the applicant had not provided a reasonable explanation to the Department for submitting a bogus document in conjunction with his Safe Haven Enterprise visa and, accordingly, concluded that the applicant met the definition of an excluded fast-track review applicant.
31. **Before the Court**
32. Mr Crowley, counsel on behalf of the applicant, identified that the applicant relied on grounds 1A, 2 and 3 in the further amended application. Those grounds are as follows:

1A. The decision by the Minister's delegate to refuse the Applicant's protection visa was vitiated by a constructive failure to exercise jurisdiction by a misconstruction or misapplication of section 36 of the Migration Act 1958 (Cth) in that the delegate was required to, but did not:

1A.1 Address the risk of harm, squarely arising from the particular section of the particular country information selected by the delegate to show the Applicant was not a 'high profile' target of assassination, that the Applicant would be at risk from a 'high and rising' risk of generalised violence upon relocation to Kabul;

1A.2 Look to the reasonably foreseeable future, as distinct from the immediate future, in its assessment of risk of harm,

by isolating a fragment of country information – that there were '26 incidents of targeted security incidents perpetrated on individuals in Kabul' between 1 September 2015 and 31 May 2016 – from its context of a deteriorating security situation, and;

1A.3 Consider whether this particular Applicant was safe in Kabul, as opposed to safer in Kabul, relative to other Afghans, and relative to residents of Kabul generally who are not the subject of a fatwa;

2. The decision by the Minister's delegate to refuse the Applicant's protection visa was vitiated by jurisdictional error by the delegate's misapplication of subsection 36(2B)(a) of the Migration Act, in that the delegate failed to have regard to the personal circumstances of the Applicant in assessing whether relocation was 'reasonable', including that:

2.1 The Applicant has 5 children under 12 years of age, a wife, a mother, a father (presumed dead), and a brother in Ghazni Province;

2.2. In the circumstance of the delegate accepting that the Applicant had a genuine fear of- persecution by the Taliban for cooperation with Western countries, the support offered by 'reintegration' programs sponsored by the Australian Government was manifestly unreasonable because it exposed the Applicant to the very same risk of persecution, and;

2.3 The 'high and rising' risk of generalized violence as set out in the particular section of the particular country information selected by the delegate.

3. The purported findings by the Minister's delegate said to invoke section 91WA of the Migration Act 1958 (Cth) that the Applicant had provided 'bogus' documents, as defined at section 5 of the Migration Act, pursuant to paragraph 91WA(1)(a) of the Migration Act, and that the delegate was not satisfied the Applicant had provided a reasonable explanation for providing the 'bogus' documents pursuant to paragraph 91 WA(2)(a) of the Migration Act, were vitiated by error of law in that:

3.1. The finding that that the delegate 'was not satisfied that the Afghan authorities would have the systems nor the record keeping functionality to keep negatives of citizens

with their tazkira on file' [CB 258] did not have an intelligible justification, or was not an open inference from the cited country information that recordkeeping 'is not centralized nor computerized;

3.2. The finding that 'it would be more reasonable to assume that a government authority would reissue the entire document' [CB 258] was an exercise in speculation, or did not have an intelligible justification, or was not an open inference from the stated evidentiary foundation:

3.3. The finding that 'I am not satisfied that the Afghan authorities have a negative photograph of the applicant' was an exercise in speculation, or did not have an intelligible justification [CB 258]:

3.4. The findings were tainted by an apprehension of bias in that a reasonable, informed, neutral observer might conclude that the delegate might not have approached the section 91WA decision with a mind open to persuasion, because, although the section 57 letter of 16 November 2016 purported to invite the Applicant's 'reasonable explanation' in relation to paragraph 91WA(2)(a), it also stated that the delegate had already 'assessed to be a bogus document' in relation to paragraph 91 WA(1)(a), and alternatively constituted a denial of procedural fairness.

33. The Court raised with Mr Crowley whether grounds 1A and 2 were capable of making out any jurisdictional error, and Mr Crowley accepted that he needed to establish an error in relation to ground 3 before grounds 1A or 2 became relevant. Mr Crowley relied upon those as going to the issue of materiality if ground 3 were made out. Mr Crowley confirmed that ground 1B was not pressed. Mr Crowley's submissions in that regard were entirely correct in that it is necessary in this case for the Court to find an error in relation to ground 3, being the assessment in respect of the application of s 91WA of the *Act*, before there could be any finding of a jurisdictional error.

34. Ground 3

35. Mr Crowley relied upon two arguments in that regard in support of ground 3. The first argument was to contend that the Delegate did not approach the determination of whether the applicant was an excluded

fast-track applicant with an open mind reasonably capable of persuasion as to the merits. The conduct upon which Mr Crowley relied was the sending of the s 57 letter dated 16 November 2016 in part of which it was identified that the taskera and driver's licence had been assessed to be a bogus document.

36. That is not of itself conduct that logically and rationally leads to a reason why the Delegate would depart from determining the matter with an open mind reasonably capable of persuasion as to the merits, as it was clearly a letter being sent pursuant to s 57 of the *Act* to provide procedural fairness and an opportunity to comment in respect of information before the decision-maker.
37. Mr Crowley submitted that the reference to having been assessed as being a bogus document meant that the Delegate had gone one step further and that this meant that, applying the 'double might' test, the Delegate should be found to have been the subject of a finding of apprehended bias.
38. The difficulty with Mr Crowley's submission is that the letter must be read as a whole. A reasonably informed layperson would understand the reference to s 57 and would read the letter as a whole. It is apparent, reading the letter as a whole, that the sentence referring to the assessment was identifying the concern that the decision-maker had and that the applicant was being given an opportunity to respond to and comment on that information. The Court does not accept that, on a fair reading of the letter by an ordinary reasonable layperson, the Delegate was doing other than identifying an assessment that gave rise to the concern which the applicant was being invited to address. The language of assessment does not on a fair reading mean the Delegate was doing other than identifying a preliminary or possible view to which the applicant was been given a fair opportunity to respond.
39. The letter is not conduct by reason of which a fair-minded lay observer might reasonably apprehend that the Delegate might not bring an independent and impartial mind to the determination of the matter on its merits. The conduct identified does not meet the 'double might' test, nor is there a logical and rational reason in respect of that conduct as to why the Delegate would depart from determining the matter on its merits.

40. No case of apprehended bias, as alleged in ground 3, is made out.
41. The second ground advanced by Mr Crowley on behalf of the applicant in relation to ground 3 is legal unreasonableness by the Delegate in its adverse finding in relation to the taskera.
42. The Court was taken to pg 24 of the DFAT country information report and, in particular, paras 5 to 8, and the reference to recordkeeping is not centralised or computerised. Mr Crowley argued that this did not mean that there might not be kept a negative of the applicant's photograph. That was nothing more than speculation by counsel.
43. The adverse finding by the Delegate was clearly open on the material before the Delegate, and was logical and rational, and does not reflect speculation by the Delegate. Further, the Delegate's findings were open on the documents, being the taskera and the driver's licence. Accordingly the adverse findings have an evident and intelligible justification. The adverse findings were not legally unreasonable.
44. Even if there was any error in relation to the official taskera, which the Court does not accept, there was no such error in respect of the reasoning in respect of the licence, and, this was an independent finding by reasons of which no jurisdictional error could be made out as alleged in ground 3.
45. The Court accepts the respondent's submission that the Delegate engaged in a process of reasoning which was not illogical or irrational, and that the findings were within her area of discretionary freedom. As apparent, the Delegate correctly understood that the definition of bogus document refers to a reasonable suspicion, rather than actual belief, and that the evidentiary material before the Delegate were clearly sufficient to support a reasonable suspicion that the taskera and the driver's licence were bogus documents.
46. Accordingly, no error of the kind alleged in ground 3 is made out.
47. Further, for the reasons given, even if there was an error in respect of the taskera, it would not extend to the driver's licence and would not be capable of giving rise to alleged jurisdictional error. The issue of materiality in relation to ground 1A and ground 2 does not arise, and given the concession referred to, it is unnecessary for the Court to

address those grounds as they are incapable of making out any jurisdictional error in the absence of error being made out under ground 3.

48. Accordingly, the further amended application does not give rise to any jurisdictional error.

49. The further amended application is dismissed.

I certify that the preceding forty-seven (47) paragraphs are a true copy of the transcript of the published oral reasons for judgment of Judge Street delivered in open Court on 14 November 2019 and the parties were provided sealed copies of the Court's orders.

Associate:

Date: 6 November 2020